

1 AARON D. FORD
2 Attorney General
3 GREGORY L. ZUNINO, Bar No. 4805
4 Deputy Solicitor General
5 State of Nevada
6 100 N. Carson Street
7 Carson City, Nevada 89701-4717
8 Tel: (775) 684-1100
9 E-mail: glzunino@ag.nv.gov

10
11 *Attorneys for Barbara Cegavske*

12
13
14
15
16
17
UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

18 FIGHT FOR NEVADA,
19 Plaintiff,
20 vs.
21 BARBARA CEGAVSKE, in her official
22 capacity as Nevada Secretary of State,
23 Defendant.

24 Case No. 3:20-CV-00837-RFB-EJY

25
26
27
28
**RESPONSE TO EMERGENCY
MOTION FOR PRELIMINARY
INJUNCTION**

29
30
31
32
33
34
35
36
37
38
39
40
41
42
43
44
45
46
47
48
49
50
51
52
53
54
55
56
57
58
59
60
61
62
63
64
65
66
67
68
69
70
71
72
73
74
75
76
77
78
79
80
81
82
83
84
85
86
87
88
89
90
91
92
93
94
95
96
97
98
99
100
101
102
103
104
105
106
107
108
109
110
111
112
113
114
115
116
117
118
119
120
121
122
123
124
125
126
127
128
129
130
131
132
133
134
135
136
137
138
139
140
141
142
143
144
145
146
147
148
149
150
151
152
153
154
155
156
157
158
159
160
161
162
163
164
165
166
167
168
169
170
171
172
173
174
175
176
177
178
179
180
181
182
183
184
185
186
187
188
189
190
191
192
193
194
195
196
197
198
199
200
201
202
203
204
205
206
207
208
209
210
211
212
213
214
215
216
217
218
219
220
221
222
223
224
225
226
227
228
229
230
231
232
233
234
235
236
237
238
239
240
241
242
243
244
245
246
247
248
249
250
251
252
253
254
255
256
257
258
259
260
261
262
263
264
265
266
267
268
269
270
271
272
273
274
275
276
277
278
279
280
281
282
283
284
285
286
287
288
289
290
291
292
293
294
295
296
297
298
299
300
301
302
303
304
305
306
307
308
309
310
311
312
313
314
315
316
317
318
319
320
321
322
323
324
325
326
327
328
329
330
331
332
333
334
335
336
337
338
339
340
341
342
343
344
345
346
347
348
349
350
351
352
353
354
355
356
357
358
359
360
361
362
363
364
365
366
367
368
369
370
371
372
373
374
375
376
377
378
379
380
381
382
383
384
385
386
387
388
389
390
391
392
393
394
395
396
397
398
399
400
401
402
403
404
405
406
407
408
409
410
411
412
413
414
415
416
417
418
419
420
421
422
423
424
425
426
427
428
429
430
431
432
433
434
435
436
437
438
439
440
441
442
443
444
445
446
447
448
449
450
451
452
453
454
455
456
457
458
459
460
461
462
463
464
465
466
467
468
469
470
471
472
473
474
475
476
477
478
479
480
481
482
483
484
485
486
487
488
489
490
491
492
493
494
495
496
497
498
499
500
501
502
503
504
505
506
507
508
509
510
511
512
513
514
515
516
517
518
519
520
521
522
523
524
525
526
527
528
529
530
531
532
533
534
535
536
537
538
539
540
541
542
543
544
545
546
547
548
549
550
551
552
553
554
555
556
557
558
559
550
551
552
553
554
555
556
557
558
559
560
561
562
563
564
565
566
567
568
569
560
561
562
563
564
565
566
567
568
569
570
571
572
573
574
575
576
577
578
579
580
581
582
583
584
585
586
587
588
589
580
581
582
583
584
585
586
587
588
589
590
591
592
593
594
595
596
597
598
599
590
591
592
593
594
595
596
597
598
599
600
601
602
603
604
605
606
607
608
609
600
601
602
603
604
605
606
607
608
609
610
611
612
613
614
615
616
617
618
619
610
611
612
613
614
615
616
617
618
619
620
621
622
623
624
625
626
627
628
629
620
621
622
623
624
625
626
627
628
629
630
631
632
633
634
635
636
637
638
639
630
631
632
633
634
635
636
637
638
639
640
641
642
643
644
645
646
647
648
649
640
641
642
643
644
645
646
647
648
649
650
651
652
653
654
655
656
657
658
659
650
651
652
653
654
655
656
657
658
659
660
661
662
663
664
665
666
667
668
669
660
661
662
663
664
665
666
667
668
669
670
671
672
673
674
675
676
677
678
679
670
671
672
673
674
675
676
677
678
679
680
681
682
683
684
685
686
687
688
689
680
681
682
683
684
685
686
687
688
689
690
691
692
693
694
695
696
697
698
699
690
691
692
693
694
695
696
697
698
699
700
701
702
703
704
705
706
707
708
709
700
701
702
703
704
705
706
707
708
709
710
711
712
713
714
715
716
717
718
719
710
711
712
713
714
715
716
717
718
719
720
721
722
723
724
725
726
727
728
729
720
721
722
723
724
725
726
727
728
729
730
731
732
733
734
735
736
737
738
739
730
731
732
733
734
735
736
737
738
739
740
741
742
743
744
745
746
747
748
749
740
741
742
743
744
745
746
747
748
749
750
751
752
753
754
755
756
757
758
759
750
751
752
753
754
755
756
757
758
759
760
761
762
763
764
765
766
767
768
769
760
761
762
763
764
765
766
767
768
769
770
771
772
773
774
775
776
777
778
779
770
771
772
773
774
775
776
777
778
779
780
781
782
783
784
785
786
787
788
789
780
781
782
783
784
785
786
787
788
789
790
791
792
793
794
795
796
797
798
799
790
791
792
793
794
795
796
797
798
799
800
801
802
803
804
805
806
807
808
809
800
801
802
803
804
805
806
807
808
809
810
811
812
813
814
815
816
817
818
819
810
811
812
813
814
815
816
817
818
819
820
821
822
823
824
825
826
827
828
829
820
821
822
823
824
825
826
827
828
829
830
831
832
833
834
835
836
837
838
839
830
831
832
833
834
835
836
837
838
839
840
841
842
843
844
845
846
847
848
849
840
841
842
843
844
845
846
847
848
849
850
851
852
853
854
855
856
857
858
859
850
851
852
853
854
855
856
857
858
859
860
861
862
863
864
865
866
867
868
869
860
861
862
863
864
865
866
867
868
869
870
871
872
873
874
875
876
877
878
879
870
871
872
873
874
875
876
877
878
879
880
881
882
883
884
885
886
887
888
889
880
881
882
883
884
885
886
887
888
889
890
891
892
893
894
895
896
897
898
899
890
891
892
893
894
895
896
897
898
899
900
901
902
903
904
905
906
907
908
909
900
901
902
903
904
905
906
907
908
909
910
911
912
913
914
915
916
917
918
919
910
911
912
913
914
915
916
917
918
919
920
921
922
923
924
925
926
927
928
929
920
921
922
923
924
925
926
927
928
929
930
931
932
933
934
935
936
937
938
939
930
931
932
933
934
935
936
937
938
939
940
941
942
943
944
945
946
947
948
949
940
941
942
943
944
945
946
947
948
949
950
951
952
953
954
955
956
957
958
959
950
951
952
953
954
955
956
957
958
959
960
961
962
963
964
965
966
967
968
969
960
961
962
963
964
965
966
967
968
969
970
971
972
973
974
975
976
977
978
979
970
971
972
973
974
975
976
977
978
979
980
981
982
983
984
985
986
987
988
989
980
981
982
983
984
985
986
987
988
989
990
991
992
993
994
995
996
997
998
999
990
991
992
993
994
995
996
997
998
999
1000
1001
1002
1003
1004
1005
1006
1007
1008
1009
1000
1001
1002
1003
1004
1005
1006
1007
1008
1009
1010
1011
1012
1013
1014
1015
1016
1017
1018
1019
1010
1011
1012
1013
1014
1015
1016
1017
1018
1019
1020
1021
1022
1023
1024
1025
1026
1027
1028
1029
1020
1021
1022
1023
1024
1025
1026
1027
1028
1029
1030
1031
1032
1033
1034
1035
1036
1037
1038
1039
1030
1031
1032
1033
1034
1035
1036
1037
1038
1039
1040
1041
1042
1043
1044
1045
1046
1047
1048
1049
1040
1041
1042
1043
1044
1045
1046
1047
1048
1049
1050
1051
1052
1053
1054
1055
1056
1057
1058
1059
1050
1051
1052
1053
1054
1055
1056
1057
1058
1059
1060
1061
1062
1063
1064
1065
1066
1067
1068
1069
1060
1061
1062
1063
1064
1065
1066
1067
1068
1069
1070
1071
1072
1073
1074
1075
1076
1077
1078
1079
1070
1071
1072
1073
1074
1075
1076
1077
1078
1079
1080
1081
1082
1083
1084
1085
1086
1087
1088
1089
1080
1081
1082
1083
1084
1085
1086
1087
1088
1089
1090
1091
1092
1093
1094
1095
1096
1097
1098
1099
1090
1091
1092
1093
1094
1095
1096
1097
1098
1099
1100
1101
1102
1103
1104
1105
1106
1107
1108
1109
1100
1101
1102
1103
1104
1105
1106
1107
1108
1109
1110
1111
1112
1113
1114
1115
1116
1117
1118
1119
1110
1111
1112
1113
1114
1115
1116
1117
1118
1119
1120
1121
1122
1123
1124
1125
1126
1127
1128
1129
1120
1121
1122
1123
1124
1125
1126
1127
1128
1129
1130
1131
1132
1133
1134
1135
1136
1137
1138
1139
1130
1131
1132
1133
1134
1135
1136
1137
1138
1139
1140
1141
1142
1143
1144
1145
1146
1147
1148
1149
1140
1141
1142
1143
1144
1145
1146
1147
1148
1149
1150
1151
1152
1153
1154
1155
1156
1157
1158
1159
1150
1151
1152
1153
1154
1155
1156
1157
1158
1159
1160
1161
1162
1163
1164
1165
1166
1167
1168
1169
1160
1161
1162
1163
1164
1165
1166
1167
1168
1169
1170
1171
1172
1173
1174
1175
1176
1177
1178
1179
1170
1171
1172
1173
1174
1175
1176
1177
1178
1179
1180
1181
1182
1183
1184
1185
1186
1187
1188
1189
1180
1181
1182
1183
1184
1185
1186
1187
1188
1189
1190
1191
1192
1193
1194
1195
1196
1197
1198
1199
1190
1191
1192
1193
1194
1195
1196
1197
1198
1199
1200
1201
1202
1203
1204
1205
1206
1207
1208
1209
1200
1201
1202
1203
1204
1205
1206
1207
1208
1209
1210
1211
1212
1213
1214
1215
1216
1217
1218
1219
1210
1211
1212
1213
1214
1215
1216
1217
1218
1219
1220
1221
1222
1223
1224
1225
1226
1227
1228
1229
1220
1221
1222
1223
1224
1225
1226
1227
1228
1229
1230
1231
1232
1233
1234
1235
1236
1237
1238
1239
1230
1231
1232
1233
1234
1235
1236
1237
1238
1239
1240
1241
1242
1243
1244
1245
1246
1247
1248
1249
1240
1241
1242
1243
1244
1245
1246
1247
1248
1249
1250
1251
1252
1253
1254
1255
1256
1257
1258
1259
1250
1251
1252
1253
1254
1255
1256
1257
1258
1259
1260
1261
1262
1263
1264
1265
1266
1267
1268
1269
1260
1261
1262
1263
1264
1265
1266
1267
1268
1269
1270
1271
1272
1273
1274
1275
1276
1277
1278
1279
1270
1271
1272
1273
1274
1275
1276
1277
1278
1279
1280
1281
1282
1283
1284
1285
1286
1287
1288
1289
1280
1281
1282
1283
1284
1285
1286
1287
1288
1289
1290
1291
1292
1293
1294
1295
1296
1297
1298
1299
1290
1291
1292
1293
1294
1295
1296
1297
1298
1299
1300
1301
1302
1303
1304
1305
1306
1307
1308
1309
1300
1301
1302
1303
1304
1305
1306
1307
1308
1309
1310
1311
1312
1313
1314
1315
1316
1317
1318
1319
1310
1311
1312<br

POINTS AND AUTHORITIES

I. INTRODUCTION

Plaintiff Fight for Nevada and its members seek to recall Nevada Governor Steve Sisolak from public office. Fight for Nevada demands a federal court order compelling the Secretary to *violate state law* in order to give its members more time to gather signatures in support of its recall petition. In a nutshell, this case presents the Court with a question of state law, not federal law, because Nevada’s recall process is governed by Article 2, § 9 of the Nevada Constitution and Nevada Revised Statutes (NRS) § 306.015 (among other statutes).¹ There is not a single allegation in this case, much less a provable fact, which demonstrates that the Secretary has done anything other than adhere to Nevada law.

To overcome this deficiency in its case, Fight for Nevada argues that the Secretary must actually violate state law in order to facilitate the exercise of rights allegedly granted by the First and Fourteenth Amendments to the U.S. Constitution. But the First and Fourteenth Amendments say little about the *process* for recalling a public official pursuant to state law. As a method of recalling public officials from state office, Nevada statutes and constitutional provisions are admittedly subject to the requirement of the Equal Protection Clause that restrictions on signature gathering be facially neutral and nondiscriminatory. *See Angle v. Miller*, 673 F.3d 1122, 1127 (2012). “[W]hen a state chooses to give its citizens the right to enact laws by initiative [or recall public officials from office], it subjects itself to the requirements of the Equal Protection Clause.”) *Id.* (internal citations and quotations omitted).

23 However, the federal courts have no power to modify provisions of state law when
24 those provisions apply fairly and equally to all petition proponents. “When a state
25 election law provision imposes only ‘reasonable, nondiscriminatory restrictions’ upon the
26 First and Fourteenth Amendment rights of voters, ‘the State’s important regulatory

¹ Like the recall process, Nevada's referendum and initiative processes are governed by comparable provisions imposing deadlines and signature gathering requirements. See Nev. Const., Art. 19, §§ 1-2; NRS 295.056(2)-(4).

1 interests are generally sufficient to justify' the restrictions." *Burdick v. Takushi*, 504 U.S.
 2 428, 434 (1992) (*quoting Anderson v. Celebrezze*, 460 U.S. 780, 788 (1983)); *see also*
 3 *Arizona Green Party v. Reagan*, 838 F.3d 983, 988 (9th Cir. 2016). This case is unique,
 4 moreover, because it involves a challenge to facially neutral, nondiscriminatory provisions
 5 of state law governing Nevada's recall process. Because the recall process is akin to
 6 impeachment, federal case law addressing the electoral process is only marginally
 7 instructive.

8 The U.S. Supreme Court has made an observation about the popular initiative
 9 process that is equally applicable to the state recall process. Regarding the initiative
 10 process, the Court observed that "[d]irect lawmaking by the people was 'virtually'
 11 unknown when the Constitution of 1787 was drafted." *Arizona State Legislature v.*
 12 *Arizona Independent Redistricting Commission*, — U.S. —, 135 S. Ct. 2652, 2659
 13 (2015) (*quoting* Donovan & Bowler, An Overview of Direct Democracy in the American
 14 States, in Citizens as Legislators 1 (S. Bowler, T. Donovan, & C. Tolbert eds. 1998)). As a
 15 means of removing public officials from office, Nevada's recall process, like its popular
 16 initiative process, implicates "the structure of its government, and the character of those
 17 who exercise government authority." *See id.* at 2673 (*quoting Gregory v. Ashcroft*, 501
 18 U.S. 452, 460, 111 S. Ct. 2395, 115 L.Ed.2d 410 (1991)). In summary, it is one method by
 19 which Nevada "defines itself as a sovereign." *See id.* In this highly unorthodox lawsuit,
 20 Fight for Nevada asks the Court to modify Nevada's sovereign process for recalling public
 21 officials from office. Because the recall process involves voting at the end of the process,
 22 after a recall proposal has qualified for the ballot, the process is presumed to be governed
 23 by the body of federal case law that addresses voting rights under the First and the
 24 Fourteenth Amendments to the U.S. Constitution.

25 However, this case is not about voting. Fight for Nevada challenges only the
 26 process for qualifying a recall proposal to appear on the ballot before anyone could cast a
 27 vote. As a question of state sovereignty, the process for qualifying a recall proposal is
 28 analogous to state laws governing impeachment. *See* Nev. Const., Art. 7, §§ 1–3. So long

1 as the process is facially neutral and nondiscriminatory, the Secretary's adherence to that
 2 process passes muster under rational basis scrutiny, as well as under the *Anderson-*
 3 *Burdick* balancing test as traditionally applied to election cases. *See, e.g., Public Integrity*
 4 *Alliance, Inc. v. City of Tucson*, 863 F.3d 1019, 1027 (9th Cir. 2016) (upholding, under the
 5 *Anderson-Burdick* analysis, Tucson's hybrid system for electing members of its city
 6 council despite the city's request for application of rational basis scrutiny).

7 The District of Nevada recently concluded that the Secretary followed the law with
 8 respect to the implementation of the all-mail primary election for June 9, 2020. *See Paher*
 9 *v. Cegavske*, — F. Supp.3d —, 2020 WL 2089813 (D. Nev. 2020). And here, it is
 10 equally self-evident that the Secretary followed the law as it pertains to the recall
 11 process. Adherence to the rule of law serves as a rational basis and lawful justification
 12 for the Secretary's decision to deny Fight for Nevada's request for extralegal
 13 accommodations as its members attempt to gather signatures in support of their recall
 14 proposal.

15 II. BACKGROUND

16 A. Statement of Undisputed Facts

17 The relevant facts of this case are undisputed. The only dispute in this case
 18 concerns: (1) the scope of the Secretary's authority to modify statutory requirements for
 19 qualifying a recall proposal to appear on Nevada's ballot (ECF No. 1 at ¶1); and (2) the
 20 nature of the State of Nevada's role in creating the conditions that are alleged to have
 21 hindered signature gathering efforts in support of Fight for Nevada's recall proposal (ECF
 22 No. 1 at ¶¶23-31).

23 As noted above, Fight for Nevada is a committee seeking to recall Governor Sisolak
 24 from public office. (ECF No. 1 at ¶1.1). The Secretary, named as a defendant in her
 25 official capacity, is the Chief Officer of Elections for the State of Nevada. NRS §
 26 293.124(1). (ECF No. 1 at ¶2). Her responsibilities include, but are not limited to,
 27 execution and enforcement of all provisions of state and federal law relating to elections,
 28 including NRS § 306.015. Pursuant to NRS § 293.247(4), the Secretary is further

1 authorized to “provide interpretations and take other actions necessary for the effective
2 administration of the statutes and regulations governing the conduct of primary, general,
3 special and district elections in this State.”

4 Fight for Nevada requested that the Secretary extend the statutory deadline for
5 gathering signatures in support of its recall proposal. (ECF No. 1 at ¶23). This statutory
6 deadline is set forth at NRS § 306.015(3). Fight for Nevada requests that this statutory
7 deadline be extended for an indefinite period of time (ECF No. 1 at pp 10–11).
8 Predictably, Fight for Nevada does not address its members’ lack of progress toward
9 gathering the required number of signatures prior to the issuance of the emergency
10 directives of which they complain. (ECF No. 1 at ¶¶16–21). In this regard, NRS §
11 306.105(3) requires that Fight for Nevada report its signature gathering progress as of
12 the midpoint between the filing of the recall petition and the May 14 deadline for the final
13 submission of signatures. Because the petition was filed on February 14, 2020, the
14 midpoint for signature submission fell on March 30, 2020. (ECF No. 10 at 2:4–6). The
15 total number of unverified signatures submitted at the midpoint was just 15,892,
16 representing a mere 6.5 percent of the total number of signatures required to qualify the
17 recall proposal for the ballot. (ECF. No. 10 at 2:7–11).

18 B. Overview of Recall and Powers of the Secretary of State

19 i. *The Statutory Deadline for Gathering Signatures in Support of a
20 Recall Petition*

21 The deadline to gather the required number of signatures for a petition for recall is
22 set forth at NRS § 306.015(3). This provision requires that petition proponents submit all
23 necessary signatures for verification not later than the 90th day after the date on which
24 the notice of intent was filed. NRS § 306.015(3) sets forth an additional midpoint
25 deadline for reporting on the progress of signature gathering. As noted above, the
26 midpoint deadline for reporting on the progress of signature gathering was March 30,
27 2020, and the deadline for the final submission of signatures is May 14, 2020. (ECF No.
28 10 at 2:1–6). Fight for Nevada had roughly one month, namely the period between

1 February 14 and March 15, to gather signatures before any COVID-19 emergency
 2 directives had taken effect. (ECF No. 10 at 1:22–23). As of March 30, Fight for Nevada
 3 had gathered only 6.5% of the signatures required to qualify its recall proposal for the
 4 ballot despite the relatively short period of time during which its members had then been
 5 subject to social distancing mandates. (ECF No. 10 at 2:7–11).

6 Although NRS § 293.127565(3) gives the Secretary the authority to extend the
 7 statutory deadline when petition gatherers are denied access to public buildings, it is
 8 inapplicable to the facts of this case. This provision states that the statutory deadline
 9 “must be extended for a period equal to the time that the person was denied the use of a
 10 public building for the purpose of gathering signatures on a petition, but *in no event may*
 11 *the deadline be extended for a period of more than 5 days.*” NRS § 293.127565(3)
 12 (emphasis added). Fight for Nevada does not specifically allege that its members were
 13 denied access to a public building, nor does it correlate the requested extension with a
 14 specific 5-day time frame as required by NRS § 293.127565(3).

15 *ii. Powers of the Secretary of State*

16 The Secretary had no power to make the statutory modifications requested by
 17 Fight for Nevada. Regarding the powers of constitutional officers, including the Secretary
 18 of State, the Nevada Supreme Court has stated:

19 Every constitutional officer derives his power and authority
 20 from the constitution, the same as the legislature does, and the
 21 legislature, in the absence of express constitutional authority, is
 22 as powerless to add to a constitutional office duties foreign to
 23 that office, as it is to take away duties that naturally belong to
 it. ... It is well settled by the courts that the legislature, in the
 absence of special authorization in the constitution, is without
 power to abolish a constitutional office or to change, alter, or
 modify its constitutional powers and functions

24 *State ex rel., Harvey v. Second Judicial Dist. Court*, 117 Nev. 754, 765, 32 P.3d 1263, 1270
 25 (quoting *State v. Douglass*, 33 Nev. 82, 92-93, 110 P. 177, 180 (1910)).

26 The constitutional powers of the Secretary of State are set forth at Article 5, §§ 19
 27 and 20 of the Nevada Constitution. Section 19 sets the qualifications for holding the
 28 office of Secretary of State, and establishes a term limit for holding the office, while § 20

1 gives the Legislature broad latitude to confer powers upon the Secretary of State in
 2 regards to record keeping, elections, commercial recordings and various other matters.
 3 However, the Legislature has not conferred emergency powers upon the Secretary of
 4 State, such that the Secretary would be authorized to make the statutory modifications
 5 requested by Fight for Nevada. In this regard, the deadlines for gathering signatures are
 6 firmly established in statute. Aside from the provisions of NRS § 293.127565(3), there is
 7 nothing express or implied in the Statutes of Nevada that would authorize the Secretary
 8 to modify a firm statutory deadline for submitting signatures in support of a recall
 9 petition.²

10 Furthermore, any proposal to extend the deadline for gathering signatures for a
 11 recall petition is fraught with practical and logistical issues, including the possible
 12 necessity of extending initiative petition deadlines as well. These practical and logistical
 13 concerns, as well as the ultimate legal question concerning the scope of the Governor's
 14 emergency powers, are most appropriately addressed by state and local elected officials as
 15 opposed to the federal judiciary. *See, e.g., New York v. U.S.*, 505 U.S. 144, 155 (1992)
 16 ("[T]he task of ascertaining the constitutional line between federal and state power has
 17 given rise to many of the Court's most difficult and celebrated cases.") For this reason, the
 18 Court should afford deference to the requirements of Nevada law.

19 **III. LEGAL STANDARD**

20 A. The Standard of Review for Preliminary Injunction

21 To obtain a preliminary injunction, Fight for Nevada must demonstrate that (1) it
 22 is likely to succeed on the merits, (2) it is likely to suffer irreparable harm in the absence
 23 of preliminary relief, (3) the balance of equities tips in its favor, and (4) an injunction is in
 24 the public interest. *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008). This
 25 traditional test applies absent Fight for Nevada's ability to demonstrate that the balance

27
 28 ² While the Governor arguably has emergency power pursuant to Chapter 411 of
 the Nevada Revised Statute to modify statutory deadlines, there is no mandatory
 requirement that he do so.

1 of equities tips sharply in its favor. *Fox Broad. Co. v. Dish Network L.L.C.*, 747 F.3d 1060,
 2 1066 n.2 (9th Cir. 2014).

3 Fight for Nevada cannot meet this burden because it is unlikely to succeed on the
 4 merits, having generally non-cognizable claims. Further, Fight for Nevada will not suffer
 5 irreparable harm because its proposal to recall the Governor from public office will not
 6 likely succeed even if the signature gathering campaign is allowed to continue beyond the
 7 statutory deadline for submitting signatures.

8 Finally, the balance of equities and the public interest during these unusual times
 9 weigh heavily against injunctive relief. Extending the deadline for gathering signatures
 10 in support of a recall petition will simply prolong the period of time during which
 11 signature gatherers will interact with the public, potentially exacerbating the spread of
 12 the COVID-19 illness. Additionally, an extension to the recall signature deadline will
 13 possibly require, in the interest of fairness, uniformity and consistency, a comparable
 14 extension to initiative petition deadlines. These extensions, in turn, would likely have an
 15 adverse impact upon preparations for the 2020 general election and the 2021 legislative
 16 session. See footnote 1, supra.

17 B. The Legal Standard for Evaluating Fight for Nevada's Claims

18 As an initial matter, the Court must determine whether this case presents a
 19 question about voting rights or a question about legislative process. If it is the former, the
 20 *Anderson-Burdick* balancing test/line of cases provide the applicable analytical
 21 framework. Fight for Nevada argues that Nevada law, if enforced according to its plain
 22 language, will cause its members irreparable harm. (ECF No. 5 at pp. 7–8). But they cite
 23 not a single case from *Anderson-Burdick* which stands for the proposition that federal law
 24 gives them a right, in the midst of a pandemic, to demand judicial modifications to
 25 Nevada's firmly-established process for qualifying a recall petition to appear on the ballot.

26 *Angle v. Miller*, supra, is instructive, but not directly on point. As the Court stated
 27 in *Angle*, “[t]here is no First Amendment right to place an initiative on the ballot.” 673
 28 F.3d at 1133 (citing *Meyer v. Grant*, 486 U.S. 414, 424 (1988)). By this reasoning, there is

1 likewise no First Amendment right to place a recall proposal on the ballot. The recall
 2 process, like the popular initiative process, is a product of state law, not federal law. The
 3 general question presented in *Angle* was whether a statutory restriction on signature
 4 gathering may, consistent with the First Amendment, disproportionately burden certain
 5 categories of speech or specific groups of speakers. *See id.* The Court acknowledged that
 6 the Equal Protection Clause applies to the initiative process, *see id.* at 1127–28, but it did
 7 not hold that the federal judiciary has the power to order modifications to state initiative
 8 laws that are facially neutral and nondiscriminatory. To the contrary, the Court in *Angle*
 9 upheld NRS § 295.012, the challenged initiative provision. That provision requires
 10 initiative proponents to obtain petition signatures from number of registered voters equal
 11 to 10% of votes cast in previous general election in each of state’s three congressional
 12 districts. *Id.*

13 The Court upheld the provision precisely because it is facially neutral and
 14 nondiscriminatory. As the Court stated, the provision “singles out no discrete or insular
 15 minority for special treatment [and] also applies to all initiatives regardless of subject
 16 matter, not solely to initiatives thought to be favored by a targeted segment of the
 17 population.” *Angle*, 673 F.3d at 1132 (*citing Gordon v. Lance*, 403 U.S. 1, 5 (1971)
 18 (internal quotations omitted)). In this case, the challenged statutory provision governing
 19 recall meets those very same criteria.

20 Nevada case law is likewise instructive, but not directly on point. In *University*
 21 *and Community College System of Nevada v. Nevadans for Sound Government*, the
 22 Nevada Supreme Court evaluated the propriety of specific government action that had
 23 restricted the use of public facilities for purposes of gathering signatures in support of an
 24 initiative petition. 120 Nev. 712, 728, 100 P.3d 179, 191 (2004). There, the Court held
 25 that the restrictions in question regarding the time, place, and manner of signature
 26 gathering were “permissible restrictions related to legitimate government safety and
 27 functional operating purposes.” *Id.* Clearly, the social distancing mandates at issue in
 28 this case serve the similar purpose of protecting the health and safety of the public.

1 Fight for Nevada does not cite a single case that extends to its members a federal
 2 right to require that the Secretary take affirmative action, in violation of Nevada law, to
 3 facilitate signature gathering in furtherance of a recall proposal. Furthermore, because
 4 this lawsuit challenges a legislative process as opposed to an electoral process, namely a
 5 process akin to impeachment, *see Arizona State Legislature*, 135 S. Ct. at 2659, judicial
 6 deference is warranted. For example, in *National Association of Social Workers v.*
 7 *Harwood*, the First Circuit Court of Appeals stated that when “a legislative body adopts a
 8 rule, not invidiously discriminatory on its face, that bears upon its conduct of frankly
 9 legislative business, we think that the doctrine of legislative immunity must protect
 10 legislators and legislative aides who do no more than carry out the will of the body by
 11 enforcing the rule as a part of their official duties.” 69 F.3d 622, 631 (1st Cir. 1995).

12 As noted above, the statute at issue here is analogous to a rule governing a
 13 legislative process, and the role of the Secretary is comparable to that of a legislator who
 14 merely enforces those rules. Although there is no judicial precedent for applying
 15 legislative immunity in this context, principles of separation of powers and federalism
 16 favor rational basis scrutiny over *Anderson-Burdick* scrutiny. *See id.* at 635 (“As a rule, a
 17 legislature’s regulation of the atmosphere in which it conducts its core legislative
 18 activities—debating, voting, passing legislation, and the like—is part and parcel of the
 19 legislative process, and, hence, not subject to a judicial veto.”)

20 If the Court applies the *Anderson-Burdick* balancing test, the Court should apply
 21 not strict scrutiny, but rather evaluate the “means-ends fit between the state’s proffered
 22 justification and the rule employed.” *See Short v. Brown*, 893 F.3d 671, 676–77 (9th Cir.
 23 2018). In *Crawford v. Marion County Election Board*, for example, the U.S. Supreme
 24 Court noted that it has not “identif[ied] any litmus test for measuring the severity of a
 25 burden that a state law imposes on a political party, an individual voter, or a discrete
 26 class of voters. However slight that burden may appear, as *Harper [v. Virginia Bd. Of*
 27 *Elections*, 383 U.S. 663, 86 S. Ct. 1079, 16 L.Ed.2d 169 (1966)] demonstrates, it must be
 28 justified by relevant and legitimate state interests ‘sufficiently weighty to justify the

1 limitation.” 553 U.S. 181, 191 (2008) (*quoting Norman v. Reed*, 502 U.S. 279, 288–289
 2 (1992)); *see also Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 359 (1997) (“No
 3 bright line separates permissible election-related regulation from unconstitutional
 4 infringements.”). But, “[w]hen a state election law provision imposes only ‘reasonable,
 5 nondiscriminatory restrictions’ upon the First and Fourteenth Amendment rights of
 6 voters, ‘the State’s important regulatory interests are generally sufficient to justify’ the
 7 restrictions.” *Burdick*, 504 U.S. at 434 (*quoting Anderson*, 460 U.S. at 788); *see Crawford*,
 8 553 U.S. at 189–90 (internal quotation and citations omitted) (“[E]venhanded restrictions
 9 that protect the integrity and reliability of the electoral process itself are not invidious.”).

10 As the U.S. Supreme Court did in *Crawford*, this Court should evaluate the
 11 constitutionality of applicable Nevada law by focusing on the state’s interests. *See id.* at
 12 191. As a matter of principle, the state has an interest in adhering to the rule of law so
 13 that deadlines and signature and witness requirements are applied uniformly to all
 14 petition proponents.³ It also has an interest in ensuring: (1) that there is adequate
 15 popular support for Fight for Nevada’s recall proposal to warrant its inclusion on the
 16 ballot; (2) that ballot access is not fraudulently procured over an atypically lengthy period
 17 for gathering signatures; and (3) that uniformity and consistency of enforcement and
 18 administration are not seriously compromised by making special accommodations for
 19 some petition proponents and not others. These are indisputably compelling and
 20 longstanding interests.

21 **IV. ARGUMENT**

22 **Fight for Nevada is Unlikely to Succeed on the Merits**

23 A. The Court Lacks Subject Matter Jurisdiction Over the Complaint

24 As Judge Miranda Du very recently noted, ‘the states’ police powers over matters of
 25 public health and safety and to act over the general welfare of their inhabitants is
 26

27 28 ³ There are currently two petitions to amend the Nevada Constitution, and four
 petitions to amends the Statutes of Nevada. The text of those petitions are posted at
<https://www.nvsos.gov/sos/elections/initiatives-referenda/2020-petitions>.

1 entrenched in the rights reserved to the state under the Tenth Amendment to the United
2 States Constitution.” *Paher*, — F. Supp.3d —, 2020 WL 2089813 at p. 7 (D. Nev.
3 2020) (*citing Reynolds v. Sims*, 377 U.S. 533, 554 (1964)). And though “the Equal
4 Protection Clause provides a check on such state authority, ‘our scrutiny will not be so
5 demanding where we deal with matters resting firmly within a State’s constitutional
6 prerogatives.’” *Gregory*, 501 U.S. at 462 (*quoting Sugarman v. Dougall*, 413 U.S. 634, 648
7 (1973)).

8 The right to recall public officials exists under the Nevada Constitution, not the
9 U.S. Constitution. Accordingly, it is Nevada’s constitutional prerogative to place
10 reasonable, nondiscriminatory conditions upon the exercise of that right. Nevada’s
11 statutory deadline is a reasonable, nondiscriminatory condition. Admittedly, Nevada now
12 faces a public health emergency that makes it difficult for signature gatherers to satisfy
13 these conditions, but this alleged “burden” on rights granted by the First and Fourteenth
14 Amendments is the same burden that every other Nevadan now faces. Due to the COVID-
15 19 pandemic, Nevadans are not free to interact with their fellow citizens in the same way
16 that they did prior to the pandemic. The limits on mobility and interpersonal contact
17 resulted from the pandemic itself, as well as the health and safety measures that were
18 put in place to limit the spread of the COVID-19 illness. Under the circumstances, the
19 Governor’s issuance of these health and safety directives was a proper exercise of the
20 powers reserved to the states under the Tenth Amendment.

21 In this context, given the absence any discriminatory burdens upon rights existing
22 under the First and Fourteenth Amendments, Fight for Nevada’s request for injunctive
23 relief amounts to nothing more than a demand that the Secretary take affirmative action
24 to facilitate the exercise of a right under the Nevada Constitution. In substance, this case
25 presents a question of state law, not federal law, because the state of Nevada has not
26 impermissibly burdened any rights under the U.S. Constitution. Therefore, the Court
27 lacks subject matter jurisdiction over Fight for Nevada’s claims. Whether the Nevada
28

1 Constitution requires that state officials take affirmative steps to accommodate a recall
2 campaign is a question for Nevada's state district courts.

3 B. Fight for Nevada is Unlikely to Succeed on the Merits of its Claim for a
4 Waiver of the Statutory Deadline for Recall Petitions

5 Despite having made little progress in gathering signatures prior to March 15,
6 2020, Fight for Nevada seeks an indefinite extension of the statutory May 14 deadline
7 described at NRS § 306.015(3). As discussed above, however, the deadline is neither
8 discriminatory on its face nor discriminatory in its current application. It impacts all
9 political activists in the same way, regardless of political affiliation, viewpoint, race,
10 ethnicity or gender. Fight for Nevada argues only that the deadline prevents its members
11 from gathering signatures during the COVID-19 pandemic. Fight for Nevada attributes
12 the signature gathering impediment to gubernatorial directives mandating social
13 distancing. However, Fight for Nevada does not identify the source of its members'
14 alleged right under the U.S. Constitution to recall a state public official. Although they
15 have a right under the First Amendment to engage in political advocacy, that right has
16 not been significantly impacted by the enforcement of NRS § 306.015(3). Fight for
17 Nevada and its members remain free to criticize Governor Sisolak in whatever manner
18 they deem appropriate other than through a recall campaign.

19 In summary, NRS § 306.015(3) serves a legitimate state interest in ensuring that a
20 recall proposal has adequate public support to qualify for the ballot. It also serves the
21 state's interest in making sure that signature gathering is completed within a 90-day
22 period of time, thus minimizing the risk that ballot access may be fraudulently procured
23 over an indefinite period of time. Moreover, the enforcement of NRS § 306.015(3) places
24 no impermissible burden upon a right that is guaranteed by the First or the Fourteenth
25 Amendment to the U.S. Constitution. Although enforcement of the statutory deadline
26 could theoretically impact Fight for Nevada's ability to recall Governor Sisolak, it does not
27 impact its members' ability to criticize Governor Sisolak in some manner other than
28 through a recall campaign. Any burden on their right to engage in political advocacy

1 through their preferred method of a recall campaign is heavily outweighed by the state's
2 interest in adhering to the rule of law and in maintaining uniformity in the application of
3 Nevada's laws governing the state's initiative, referendum and recall petition processes.

4 **Fight for Nevada Cannot Demonstrate Irreparable Harm Because There
5 are Adequate Means Available for its Members to Criticize the Governor**

6 As discussed above, Fight for Nevada does not have a right under the U.S.
7 Constitution to recall a state public official from office. Insofar as Fight for Nevada may
8 prefer to use a recall campaign as a method of criticizing Governor Sisolak, the burden
9 upon this preference is minimal compared to the harm that will likely result to the state
10 if the statutory deadline is extended. Fight for Nevada and its members can continue to
11 criticize the Governor by means other than a recall campaign. Additionally, Fight for
12 Nevada is unable to establish causality between enforcement of the May 14 deadline and
13 its inability to qualify the recall proposal for the ballot. As evidenced by the midpoint
14 submission of signatures, the recall proposal has insufficient public support to earn a
15 place on the ballot. Consequently, due to the lack of a causal relationship between the
16 signature deadline and the inability to gather a sufficient number of signatures, Fight for
17 Nevada cannot reasonably argue that enforcement of the deadline will cause its members
18 irreparable harm. (ECF No. 10 at 2:7–11).

19 **The Balance of Equities Favors the Secretary**

20 An extension of the deadline for gathering signatures in support of Fight for
21 Nevada's recall campaign will compromise the state's ability to uniformly and
22 consistently enforce and administer the statutory deadlines and provisions governing the
23 initiative process; it will prolong the time during which signature gatherers will interact
24 with the public, possibly exacerbating the spread of the COVID-19 virus; and it will
25 compromise the state's ability to ensure that the recall proposal has adequate public
26 support to warrant its inclusion on the ballot. Compared with the minimal imposition
27 upon Fight for Nevada's preferred method of criticizing Governor Sisolak, the potential
28

1 harm to the state of Nevada weighs heavily in favor of denying the motion for preliminary
2 injunction.

The Public Interest Favors the Secretary

4 There is no genuine doubt that Nevada has the power to protect the health of its
5 citizens, particularly in an emergency such as this. Prior to ratification of the
6 Constitution, various colonies had quarantine laws, thereby establishing the legal
7 tradition of local and state jurisdiction over matters of public health reflected in the
8 Constitution's reservation of power to the states to regulate public health, safety, and
9 morals. *Gibbons v. Ogden*, 22 U.S. 1 (1824). It is in this context that Fight for Nevada
10 seeks to exploit the public health emergency for its benefit, invoking the resulting health
11 and safety directives as justification for extending the statutory deadline for gathering
12 signatures in support of a recall campaign. According to the available evidence, the recall
13 campaign has insufficient public support to earn a place on the ballot. Under these
14 circumstances, it is in the public interest to uphold the rule of law and enforce NRS §
15 306.015(3) according to its plain language.

V. CONCLUSION

17 The instant lawsuit against Secretary Cegavske presents a question of state law,
18 not federal law. That question is whether the state has an obligation to facilitate the
19 exercise of a right under the Nevada Constitution when a pandemic makes it difficult to
20 satisfy the lawful statutory conditions on the exercise of that right. Fight for Nevada fails
21 to identify a violation of federal law or the U.S. Constitution. For this reason, and the
22 other reasons discussed above, the Court should deny Fight for Nevada's motion for a
23 preliminary injunction against the enforcement of NRS § 306.015(3)

DATED this 13th day of May, 2020.

AARON D. FORD
Attorney General
By: Gregory L. Zunino
GREGORY L. ZUNINO
Deputy Solicitor General
gzunino@ag.nv.gov

Attorneys for Secretary of State

CERTIFICATE OF SERVICE

I certify that I am an employee of the Office of the Attorney General, State of Nevada, and that on this 13th day of May, 2020, I filed and served with this Court's CM/ECF electronic filing system, **RESPONSE TO EMERGENCY MOTION FOR PRELIMINARY INJUNCTION**, served listed below:

Robert E. Barnes, Esq.
robertbarnes@barneslawllp.com

Jeffrey Jaeger, Esq.
jeff@jeffaeger.com
Pro Hac Vice Pending

Counsel for Plaintiff


An employee of the Office
of the Attorney General